STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY III
ATTORNEY GENERAL

350 METRO SQUARE BLDG.
121 E. SEVENTH PLACE
ST. PAUL, MN 55101-2147
TELEPHONE: (612) 296-6030
FACSIMILE: (612) 297-7073

May 29, 1996

Office of the Secretary
Federal Communications Commission
1919 M. Street N.W.
Room 222
Washington, D.C. 20554

Re: CC Docket No. 96-98
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996
Reply Comments of the Minnesota Public Utilities Commission

Dear Secretary:

Enclosed for filing in your office please find the original and 16 copies of the Reply Comments of the Minnesota Public Utilities Commission as it relates to the above-referenced matter. Copies have also been forwarded to Janice Myles of the Common Carrier Bureau and to International Transcription Services, Inc.

No. of Copies rec'd 0+16
List ABCDE

Sincerely,

Margie Hendriksen
Assistant Attorney General

612/296-0410

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:

Implementation of the Local Competition
Provisions in the Telecommunications
Act of 1996
CC Docket No. 96-98

REPLY COMMENTS OF THE STATE OF MINNESOTA PUBLIC UTILITIES COMMISSION

Margie E. Hendriksen
Assistant Attorney General
121 7th Place East
Suite 350
St. Paul, MN 55101
(612) 296-0410

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:

Implementation of the Local Competition
Provisions in the Telecommunications
Act of 1996
CC Docket No. 96-98

INTRODUCTION AND SUMMARY

The Minnesota Public Utilities Commission ("Minnesota PUC") submits the following reply comments to the Federal Communications Commission ("FCC") on its Notice of Proposed Rulemaking ("NOPR") on Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 ("the 1996 Act"), adopted and released April 19, 1996.

Since 1985, the Minnesota PUC has adopted a procompetitive policy in regulating the intrastate telephone industry by finding in that year that competition in intra-LATA and inter-LATA toll markets is in the public interest. Minnesota also required intra-LATA equal access dialing parity prior to the implementation of the 1996 Act, and is one of the states permitted to require a Bell Operating Company to provide equal access prior to its admission to the inter-LATA markets. Section 271(e)(2)(B) of the 1996 Act.

Prior to 1995, Minnesota law did not provide exclusive service areas for local exchange service areas, but limited market entrants based on a public convenience and necessity standard. Under that somewhat elastic standard, the Minnesota PUC had begun to allow some competition with US West in the St. Paul/Minneapolis metro area. In 1995, the Minnesota legislature

enacted a local exchange competition statute and eliminated the earlier market entry restrictions based on public convenience and necessity. Minn. Stat. § 237.16 (Supp. 1995).

The Minnesota PUC supports the policy of local competition that the 1996 Act mandates, but is concerned that a number of the legal interpretations tentatively concluded in the NOPR extend the FCC's authority beyond that authorized in the 1996 Act, and illegally usurp state authority over the regulation of intrastate telephone matters. Additionally, the Minnesota PUC believes that the 1996 Act reserves the states' authority to use discretion as guided by the 1996 Act to implement the Act's provisions in a manner in harmony with our federal system. The Minnesota PUC does not believe the 1996 Act gave the FCC broad authority in sections 251 and 252 to supplant the states' authority to regulate intrastate telephone services.

Prior to the 1996 Act, many states had already begun implementing state laws requiring local competition. The Minnesota PUC has reviewed a number of these pioneering states' comments[1] which argue that the states are entitled under the 1996 Act, and should be encouraged as a matter of good public policy, to experiment and innovate ways to make local competition work in varied circumstances. The Minnesota PUC agrees with these commentators and the

[1] The states of New York, Illinois, Florida and Washington, prior to the 1996 Act, authorized local exchange competition, and the Minnesota PUC endorses the policy concerns and legal objections in their comments relating to the FCC's tentative conclusion to make national standards for all the various states and to eliminate flexibility for states.

National Association of Regulatory Utility Commissioners that the proposed FCC policy of creating national pricing standards where "one size fits all" is not legally supportable and also not effective policy for facilitating local competition throughout the country. The Minnesota PUC, therefore, opposes the FCC adopting national rules for interconnection and arbitration for intrastate telephone service beyond the subject matter of intrastate service expressly referenced in section 251 of the 1996 Act. The Minnesota PUC also opposes any rule, such as those that have been suggested by industry commentators[2], that would have the FCC rather than the state commissions establish intrastate rate making policies. Further, the Minnesota PUC also believes that 47 U.S.C. § 208 does not change the states' reserved authority to hear complaints of alleged violations of section 251 or 252 interconnection agreements as a part of their regulatory authority over intrastate telephone matters. State commissions, not the FCC, are the appropriate forum for the resolution of these disputes.

The NOPR is extensive, containing over 294 paragraphs. The Minnesota PUC did not file initial comments and intends in this reply to limit its comments as summarized above.

MINNESOTA REPLY COMMENTS

1. The FCC's Authority to Adopt Rules on Interconnection Agreements and Arbitration of Interconnection Agreements for Intrastate Telephone Services is Expressly Limited by 47 U. S. C. Section 152(b) and Sections 251 and 252 of the 1996 Act.

---

[2] See, e.g. US West, Inc.'s comments at pp. 7-8, and MCI Telecommunication Corp.'s comments at pp. 59-77.

The scope of the FCC's proposed rules concerning interconnection agreements and arbitrations to establish local exchange service competition exceed the authority granted to the FCC by Congress, and are also counterproductive to fostering competition.

The NOPR at paragraph 37 states:

> ...we tentatively conclude that Congress intended sections 251 and 252 to apply to both interstate and intrastate aspects of interconnection, service, and network elements, and thus, that our regulations implementing these provisions apply to both aspects as well.

The NOPR at paragraph 38 states:

> (W)e also tentatively conclude that it would be inconsistent with the 1996 Act to read into sections 251 and 252 an unexpressed distinction (between intrastate and interstate services) by assuming that the FCC's role is to establish rules for interstate aspects of interconnection, and the states' role is to arbitrate and approve intrastate aspects of interconnection agreements. (Parenthetical material added.)

The NOPR at paragraph 39 tentatively concludes that the general reservation of state authority over intrastate telephone services found in section 2(b) of the 1934 Act (47 U.S.C. 152[b]) does not apply with respect to sections 251 and 252 of the 1996 Act, and that the FCC may take jurisdiction over intrastate charges, classifications, practices, services, facilities or regulations.

The Minnesota PUC agrees, as will be discussed herein, with the comments of other state commentators and the National Association of Regulatory Utility Commissioners that these tentative conclusions are incorrect as a matter of law.

The ability of the federal government to displace state law is based in the Supremacy Clause, located at Article VI of the United States Constitution. Respect for our federal system of government has caused courts. prior to invalidating state law, to look for clear indications that Congress intended to exercise the national government prerogatives under the Supremacy Clause. Jones v. Rath Packing, Co., 430 U. S. 519,525, 97 S. Ct. 1305, 1309 (1977). Therefore, a court will first look at the federal statute to determine from the express language of the Act itself whether Congress intended to displace state law. Douglas v. Seacoast Products, Inc., 431 U.S. 265, 271-72, 97 S. Ct. 1744,1745 (1977). In the 1996 Act, Congress chose not to delete section 152(b) of 47 U.S.C. This section expressly reserves to the states authority over intrastate telephone charges, classifications, services, facilities and regulation.[3] Hence, the tentative conclusion of the NOPR that Congress intended to vest the FCC with jurisdiction over these intrastate matters is not supported by the language of the 1996 Act and is unlikely to be upheld by a court.

In Louisiana Public Service Commission v. FCC, 476 U.S. 355, 106 S. Ct. 1890 (1985), the Supreme Court reviewed section 152(b) of the existing law. The Court held that this reservation of states' rights restricts the jurisdiction of the FCC to act on intrastate matters, and

---

[3] NARUC Initial Comments at pages 10-11 describe the legislative history of the 1996 Act, in which there were *failed* attempts to amend section 152(b) of the Telecommunications Act to allow the FCC to regulate intrastate interconnection agreements and arbitrations on the broad basis it now proposes.

also exceptions to this broad policy should be *narrowly* construed to avoid conflict with state regulation. Id. 476 U.S. at 370, 106 S. Ct. at 1899.

Section 152(b) of 47 U.S.C. was not deleted by the 1996 Act, nor was it amended to exclude sections 251 and 252 from its reservation of states' rights. Neither is there language in sections 251 or 252 which strips the states of their jurisdiction over intrastate interconnection agreements, placing it in the hands of the FCC. Section 251 expressly lists those few areas where the FCC will establish standards. However, the intent of Congress not to have the FCC preempt the entire area is found at section 251(d)(3), entitled "Preservation of State Access Regulations", which says:

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a state commission that (A) establishes access and interconnections obligation of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

In Louisiana Public Service Commission v. FCC, 476 U.S. at 374-5, 106 S. Ct. 1902, the Court analyzed the limits of the FCC's rulemaking authority. The Court said:

> First, an agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign state, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency. Section 152(b) constitutes...a congressional *denial* of power to the FCC to require state commissions to follow FCC practices...Thus we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself.

> To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant an agency power to override Congress. This we are both unwilling and unable to do.

Although the court has expressed a willingness to determine if there is an implied intent by Congress for an agency to preempt state regulation, it will not allow preemption where "...it appeared from the statute or its legislative history that the accommodation is not one that Congress would not have sanctioned." City of New York v. FCC, 486 U.S. 57, 64, 108 S. Ct. 1637, 1642 (1988).

Congressional intent not to preempt is quite clear through the express language of the 1996 Act in section 251(d)(3); the retention of section 152(b); and also section 601(c)(1) that the FCC was not to disturb the traditional jurisdictional relationships between the states and the federal authorities. Section 601(c)(1) states:

> This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede federal, state, or local law, unless expressly so provided in such Act or amendments.

In "The Law of Preemption, A Report of the Appellate Judges Conference, American Bar Association" (1991), the authors note that courts are "wary" about "the potentially expansive scope of the administrative preemption doctrine." P. 39. The article cites to Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 717, 105 S. Ct. 2371, 2377 (1985), where the Court said:

> We are even more reluctant to infer preemption from the comprehensiveness of regulation from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to go into a field, its regulation will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy clause jurisprudence.

The Minnesota PUC believes that the FCC has authority from the 1996 Act to adopt rules on intrastate interconnection agreements only with respect to: (I) number portability - section 251(b)(2) expressly directs the FCC to establish "requirements"; (II) numbering administration and cost recovery - section 251(e) directs the FCC to "create or designate" "entities" to administer telecommunications numbering and make such numbers available on an equitable basis and establish a cost recovery mechanism; (III) resale - section 251(c)(4)(B) imposes a duty for resale, but provides states can vary from Commission regulations under certain circumstances; and (IV) unbundling of network elements - section 251(d)(2).

The FCC is without authority to set national pricing standards for intrastate services connected with interconnection agreements and arbitrations, and should not attempt to do so in these rules. It is the states' responsibility to determine if the incumbent LEC's "rates, terms, and conditions" for interconnection, unbundled network elements, and collocations are "just and reasonable and nondiscriminatory", not the FCC's. Section 252(d). The Minnesota PUC agrees with NARUC comments at p. 19 that:

> Commission-established prices (or pricing standards) for intrastate interconnection, services, and unbundled network elements will eviscerate state authority to realistically control retail pricing of local exchange services to end users. Thus, FCC-imposed pricing guidelines would have the effect of preempting the states' pricing of intrastate services in the face of ...the dictates of section 152(b) that "nothing" in the Act will remove state authority to set intrastate rates.

The Minnesota PUC also concurs with NARUC at p. 20 of its comments that "(p)ricing issues are extremely complex as LECs have different cost structures in different regions", and that the tentative policies of the FCC announced in the NOPR "would not only undermine state authority, but likely prove unworkable." Id. NARUC continues that, "the notice's prescriptive regulatory approach to pricing issues could unravel many state commission-broker residential rate freezes and completely disrupt existing state price cap regimes." Id.

2. The FCC Should Reject Industry Suggestions That it Should Review State Agency Actions to Determine if the States' Actions are Preempted Under the 1996 Act.

US West, in its initial comments, advances a radical expansion of FCC authority that is unsupported by law, but which may be a logical extension of the FCC's proposed rules to take over states' pricing and rate-making authority. US West suggests that the FCC, rather than state courts, or even federal courts, have judicial review authority over state commission decisions in intrastate rate cases. US West states its proposition thus:

> No matter how the Commission chooses to exercise its authority over interconnection and unbundling, it must implement rules to ensure that state regulations do not undermine either the 1996 Act or the Commission's rules. There is a critical and very real danger that various regulatory commissions will attempt to transfer costs from local retail ratepayers to interconnectors (and visa versa) in a manner that both materially impedes competition and unlawfully deprives incumbent LECs of the opportunity to recover investment.

P. 3 of US West comments.

US West says, "(T)he Commission has a statutory mandate to take action in those specific cases in where a state is **insistent upon regulating** in a manner inconsistent with the Act." (Emphasis added.) US West comments at p. 7. US West then cites as an example of this type of state action a decision of the Washington Utilities and Transportation Board ("Washington UTC") in a recent US West rate case.[4] US West argues that the FCC should prevent states from making decisions, such as Washington UTC, through adoption of prescriptive rules. Id. at 8. US West argues that the rules should be written so that the Washington UTC would have to raise residential rates, rather than lower them as they did in their rate case. Id. This suggestion is contrary to 47 U.S.C. 152(b), and should be clearly and resoundingly rejected. The desire for highly prescriptive pricing rules by US West graphically

[4]Washington UTC, Docket No. UT - 950200, U.S. West Communications, Inc. v. Washington Utilities and Transportation Commission, King County Superior Court, 96-2-09623-7-SEA.

demonstrates the relationship between national pricing rules and the real potential for unlawful federal interference with the states' abilities to regulate intrastate telephone matters and protect its captive ratepayers.

Other industry commentators, such as MCI, also suggest national pricing standards that would restrict the right of the state to regulate intrastate pricing. MCI comments at p. 59-77. While US West wants rules to direct state commissions to raise their residential rates, MCI wants rules that require state commissions to lower LEC access charges to interexchange carriers. P. iii of MCI comments.

If the FCC decides to adopt national pricing rules for intrastate rates, it is quite possible that the next development will likely be a petition to the FCC to review a state regulatory proceeding by a telephone company. Section 252(e)(5) states that the FCC's jurisdiction may be invoked if the "state commission fails to carry out its responsibilities under this Act ." It is not inconceivable that members of the industry, if they are disgruntled by a state regulatory decision, would argue to the FCC that the state commission has failed to carry out its duties under the Act, as some of the commentators have done in their initial comments. The FCC should make it clear that section 252(2)(5) refers only to inaction by the states with respect to express provisions of section 252, and not to any state regulatory action with which one segment or another of the industry may disagree and try to relate to a section 252 duty.

The 1996 Act clearly provides review of state commissions' section 252 decisions in federal district court, not the FCC. Section 252(e)(6). The FCC in its rules under section 252(e)(5) should make clear that it will only assume jurisdiction where there is nonaction by a state commission in an express section 251 or 252 duty.

3. The FCC Does Not Have Initial Jurisdiction to Hear Complaints About Violations of Interconnection Agreements or Arbitrated Settlements.

The NOPR at paragraph 41 states:

> We also seek comment on the relationship between sections 251 and 252 and the Commission's existing enforcement authority under section 208. Section 208 of the Act gives the Commission general authority over complaints regarding acts by "any carrier subject to this Act, in contravention of the provisions thereof." Does this mean the Commission has authority over complaints alleging violations of requirements set forth in sections 251 or 252? If not, what forum would such complaints be reviewed? In state commissions? In courts ?...

The Minnesota PUC believes that the FCC's authority under 47 U.S.C. § 208 is limited by the reservation of state authority found at 47 U.S.C. § 152(b). Hence, complaints of violations of state orders on interconnection agreements dealing with intrastate telephone service are subject to state commission jurisdiction, not the FCC. Further, as a practical matter, the state commission, having issued the order, is more familiar with its terms and the parties to the proceedings. As a result, states will handle the complaint at the local level in a more expeditious and less expensive manner. State commission orders generally are obeyed under threat of civil

penalty, and there are enforcement mechanisms to levy fines, either through administrative action or through the state court system. Minn. Stat. § 237.461 (Supp. 1995) authorizes enforcement of Minnesota PUC orders "by any one or combination of: criminal prosecution, action to recover civil penalties, injunction, action to compel performance, and other appropriate action." State remedies will insure that the state commission orders are carried out with respect to interconnection agreements.

CONCLUSION

Implementing the national policy of making local telephone service competitive is a difficult and complex task. The Congress, realizing the enormity of the task, wisely divided the responsibilities for achieving it between the FCC, state commissions, and the industry. The proposed rules, to the extent they will usurp the role reserved to the states by the 1996 Act and section 152(b)(2) of the existing law, will make that job much more difficult and even more prone to litigation then it already is. For this reason, the Minnesota PUC urges the FCC will limit the scope of their rules as discussed above, thereby allowing the states the needed flexibility to carry out the policy objectives of the Act.

Respectfully submitted,

Dated: 5/29/96

Margie Hendriksen
Assistant Attorney General

For the Minnesota Public Utilities Commission